IN THE HIGH COURT OF BOMBAY AT PANAJI

CRIMINAL APPEAL NO. 40 OF 2004

AND

CRIMINAL APPEAL NO. 41 OF 2004

Shri Ajay Shetty
Son of I. A. Shetty
aged 34 years, Indian National,
Proprietor of M/s. Pride Industries,
having his office at and residence of
Pitruchaya, Opposite Ashiyana Park,
near Power House,Davorlim Road,
P.O. Navelim 403 707,
Salcete, Goa. ..... Appellant

V e r s u s

1. Mr. Savio Faria
   Major in age, Proprietor of
   Grace Marketing, House No. 1162/A,
   Fox' Hill, Raia, Salcete Goa.

2. State (Through Public Prosecutor)
   Panaji.

(Registered Addresses) ..... Respondents

Mr. S. S. Kakodkar, Advocate for the Appellant.

Mr. A. D. Bhobe, Advocate for Respondent no.1.

Ms. Winnie Coutinho, Public Prosecutor for Respondent no.2.

CORAM: N. A. BRITTO, J.

DATE: 21st September, 2006.

J U D G M E N T

These are Complainant's appeals against the acquittal of the accused under Section 138 of the Negotiable Instruments Act, 1881, ('Act' for short).

2. The parties hereto are being referred to in the names as they appear in the cause title of the complaints.

3. The Complainant filed two complaints against the accused on 17.01.2003. Both the complaints were tried together and disposed of by a common Judgment dated 23.4.2004 by the learned Chief Judicial Magistrate, Margao. Hence, this common Judgment disposing of both the appeals.

4. The subject matter of both the complaints were two cheques issued by the accused to the Complainant. There is no dispute that the Complainant was supplying to the accused lubricants, auto polishes, etc. from August, 1999 to 20.01.2002 or thereabout. The subject matter of one complaint was cheque no. 24192 dated 18.10.2002 for Rs.15,200/- drawn by the accused on Ratnakar Bank Limited, and, the subject matter of the other complaint was cheque no. 3519 dated 11.11.2002 for Rs.50,000/- drawn on Union Bank of India. The first cheque was presented by the Complainant on 19.10.2002 for payment and was returned with endorsement “insufficient funds” on

26.10.2002. The second cheque was presented on the same day i.e. 11.11.2002, and, was returned with endorsement "exceeds arrangements" on the same day. The Complainant addressed statutory notice regarding the first cheque on 09.11.2002, and, as regards the second cheque on 15.11.2002, which notices, according to the Complainant, the accused received but did not comply within fifteen days from the date of the receipt of the said notices.

5. The case of the Complainant was that the said two cheques were issued by the accused towards part payment of the goods supplied by the Complainant to the accused. The case of the accused was that the said cheques were given to the Complainant as security deposit in June 2000.

6. The Complainant examined himself in support of his case and so did the accused in support of his defence. Both the parties also produced documents.

7. The Complainant in his evidence stated that he was doing business in the name of Pride Industries while the accused was doing business in the name of Grace Marketing. The Complainant stated that both the said cheques were given to him one week before the dates mentioned therein and although the cheques were written in all respects by the accused, it is the Complainant who inserted the said dates. The Complainant produced a writing at exhibit 21/(C). According to the Complainant, he had sent the said writing

to the accused on 31.12.2001 and the accused on the reverse of the same, admitted his liability to the extent of Rs.3,00,000/-. As per the Complainant, the said writing by the accused was signed by his father and his uncle at Hotel Hill View at Aquem, Margao. The Complainant also stated that as per the said writing given by the accused, the accused had given a time schedule of the payments and the instalments to be made. In cross examination, the Complainant admitted that if the material supplied to the accused was found to be defective, then it was required to be returned and admitted that he had received from the accused goods worth Rs.96,586.55 and which were reflected on the said writing under credit note for Rs.2,17,977/-. It was also suggested to the Complainant that the cheque of Rs.50,000/- was given by the accused to the Complainant as security with the starting of the business relationship between the Complainant and the accused, a suggestion which the Complainant denied. As per the accused, both the cheques were given by a way of part payment of the goods supplied to the accused. It was suggested to the accused that along with cheque for Rs.50,000/- bearing no. 3519, one more cheque bearing no. 3518 for Rs.60,000/- was given to him and the Complainant stated that he did not remember about the same. The Complainant also denied that the cheques nos. 3518 for Rs.60,000/- and 3519 for Rs.50,000/-, were issued in the month of June, 2000. The Complainant also denied that cheque no. 3519 for Rs. 50,000/- was given as security or that he was asked by the accused not to deposit the same. The Complainant also denied that one Lyold Sequeira was present at the said Hill View Hotel and that he was not permitted to participate

in the conference. The Complainant also denied that the Complainant and other persons present, had forced the accused to sign exhibit 21/(C). In further cross examination, the Complainant admitted having collected Rs.10,000/- from M/s. Auto Parts Corner as well as Rs.6,118/- from M/s. Haroon Hardware, Fatorda, but stated that for the said amount collected by him, he had given credit to the accused as shown on the said writing exhibit 21/(C). The Complainant also denied that the Complainant was paid all his dues after execution of the said writing exhibit 21/(C).

8. On the other hand, the accused in his evidence stated that he had given the cheque for Rs.50,000/- in June, 2000 without date to the Complainant as deposit towards taking material from the principal Company and the Complainant used to show his cheques to his principal supplier to get the material. As per the accused, the Complainant put the date later on the said cheque. The accused also stated that simultaneously with the cheque of Rs.50,000/-, he had also given a cheque of Rs.60,000/- bearing no. 3518 dated 01.07.2000. To support his statement, the accused produced a statement of his Bank Account. The accused stated that the Complainant had collected the payments directly from the parties to whom they were supplying the materials and in support of the said statement, the accused produced three statements, exhibit D.w.1/B maintained by the accused, of the supplies made by the accused to different suppliers. The accused stated that even after the year 2000, he had paid money to the Complainant by DD, Pay Order and Cheque and he

had told the Complainant orally to give the cheques back to him. The accused further stated that the cheque was given by him to the Complainant as security deposit and many goods of the Complainant, which were defective were lying with him of the value of Rs.28,000/- approximately. The accused produced two letters purported to have written by him to the Complainant dated 16.07.2002 and 25.7.2002, which according to the Complainant, the Complainant had not received the same. The accused stated that he had not received any legal notice from the Complainant in both the cases and the signatures on the AD cards produced by the Complainant are not his and since he had not received the notices, he had not replied to the same. In cross examination, the accused stated that from the first and the last transaction between the Complainant and the accused, the Complainant supplied to the accused material worth more than Rs. 4,00,000/- and the total payment made by him to the Complainant was Rs.2,32,000/- and the value of defective goods was about Rs.2,19,000/- and the entire defective goods had been returned to the Complainant. The accused admitted that on the writing exhibit 21(C), the writing was his and so also the signature and that he had written the respective amounts to be paid by him on the respective dates but added to say that he was forced to write and sign the reverse page. The accused admitted that the amount due to be payable by him to the Complainant was Rs.3,00,000/-, which he promised to pay but added to say that the promise was taken from him forcibly. The accused admitted having dated the said writing as 20.01.2002 and further admitted that he did not have any written letter or documents retracting the said admission on exhibit 21(C).

The accused stated that he had not lodged any police complaint to the fact that his signature was taken by the complainant by force. It was suggested to the accused that the goods supplied to him were worth Rs.6,70,315.40 but accused stated that the net work was only Rs. 4,70,350/-. The accused was again questioned as to whether the amount of Rs.4,72,350/- was excluding the credit note given to him and answered by stating that the amount of Rs.4,72,350/- was the gross amount. The accused was again questioned as to what was the credit given to him and answered that credit towards defective material was given to the tune of Rs.2,19,000/-. The accused denied the suggestion that the subject cheques of Rs.15,200/- and Rs.50,000/- were not given towards security. The accused also denied that he was liable to pay to the Complainant a total sum of Rs.3,15,000/- and against the said amount, the accused had issued the said cheques.

9. As far as the appellate powers of this Court are concerned, there can be no dispute about it. The Apex Court has held that an Appellate Court has full power to review the evidence upon which the Order of acquittal is founded but while exercising such an appellate power in case of acquittal, the Appellate Court, should not only consider every matter on record having a bearing on the question of facts and reasons given by the Courts below in support of its order of acquittal, it must express its reasons in the Judgment, why the acquittal is not justified and if two reasonable conclusions can be reached on the basis of the evidence on record, the Appellate Court shall not

disturb the finding of the trial Court. (See ***Bhim Singh Rup Singh v. State of Maharashtra (1974 (3) S.C.C. 762)***, followed in ***C. Anthony v. K. G. Raghavan Nair (AIR 2003 S.C. 182)***, reliance on which has been placed on behalf of the accused).

10. The first aspect which needs to be considered is regarding the service of the statutory notice which has not been dealt with by the learned CJM and regarding which no serious issue has been raised before this Court as well. The Complainant produced the AD card of the notice dated 09.11.2002, which shows that the notice was delivered at the given address on 12.11.2002. Likewise, the AD Card of notice dated 15.11.2002 shows that it was delivered on 22.11.2002. When the accused was questioned as regards the receipt of the said notices, the accused stated in his statement under Section 313 that he had not received the notice dated 09.11.2002 but as regards notice dated 15.11.2002, he stated that he did not remember about the same. In his evidence before the Court, the accused stated that he had not received any legal notice from the Complainant in either of the two cases. In cross examination, the accused admitted that the address given in the cause title was correct and that all the correspondence addressed to him and his family members is addressed at the said address and received by them. Accused also stated that there were no employees working for him and in his absence, his wife accepts postal envelopes/letters. Again when it was suggested to him that the said notices were delivered by the postman at his said address and were received by him, the

accused denied the suggestion. The question is whether a bare statement of the accused was sufficient to dislodge the presumption available to the Complainant of service of notice under Section 27 of the General Clauses Act, 1897? In the case of ***Dalmia Cement (Bharat) Ltd. v. Galaxy Traders & Agencies Ltd & Ors. (2001 (6) S.C.C. 463)***, the Apex Court has observed that the presumption available under Section 27 of the General Clauses Act or for that matter under Section 114(f) of the Indian Evidence Act, 1872, is available to both Civil as well as Criminal proceedings but it is for an accused to rebut the said presumption either through the evidence led by the Complainant or by leading evidence. In the case of ***K. Bhaskaran v. Sankaran Vaidhyan Balan & anr. (1999 Cri. L. J. 4606)***, the Apex Court was dealing with a case where a notice was returned with endorsement unclaimed and the Apex Court held that once a sender of a notice dispatches the notice by post with correct address written on it, it is deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice. In the case at hand, it is not the case of the accused that the signature on the AD cards produced by the Complainant is not that of his wife inspite of the fact that the accused had stated, that in his absence, his wife receives the correspondence. The bare statement of the accused alone, that he had not received the said legal notice, is in view, not sufficient to dislodge the presumption available to the

Complainant by virtue of Section 27 of the General Clauses Act, 1897. The onus of rebutting the said presumption was on the accused and the accused was certainly required to produce further proof which was convincing and reliable, apart from his own statement, that he had not received the notice to rebut the presumption. A bare statement of the accused alone that he had not received the said notice is certainly insufficient to rebut the presumption available to the Complainant, as aforesaid. The burden was on the accused to rebut the aforesaid presumption. The Apex Court again in the case of ***V. Raja Kumari v. P. Subbarama Naidu & anr. (AIR 2005 S.C. 109)***, has stated that although Section 138 of the Act does not require that the notice should be given only by post, nonetheless, the principle incorporated in Section 27 (of General Clauses Act, 1897), can profitably be imported in a case where the sender has dispatched the notice by post with the correct address written on it, then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort the strategy of subterfuge by successfully avoiding the notice. Therefore, it has got to be presumed that the accused had received both the notices as stated by the Complainant on 12.11.2002 and 22.11.2002 respectively and as indicated on the AD cards produced by the Complainant.

11. The case at hand is a case where the Complainant had approached

the Court with the said two cheques which were dishonoured by the accused not only with the aid of the presumptions available in his favour under the relevant provisions of the Act particularly under Section 139, but also with a writing which was first sent by the Complainant to the accused on 31.12.2002 and which the accused had returned on 20.01.2002 admitting his liability in the sum of Rs.3,00,000/- and with the mode as to how he was going to discharge the same. The only explanation given by the accused is that the said writing was taken by force from him. If the said writing was taken by force from the accused, the accused would not have remained cool for one year and half and raised the issue that it was taken by force only in the cross examination of the Complainant. As already stated, the accused had received the statutory notices sent by the Complainant on 12.11.2002 and 22.11.2002 calling upon the accused to pay the amounts due and the accused would have certainly reacted in one way or other, other than remaining totally silent. There is no explanation from the accused why he did not ask for the cheques back from the complainant in case the said cheques were issued previously and the said writing was taken by force. In his cross examination, the accused admitted that he did not have any written letter or document retracting the said admission on the said writing/Statement of Account/Exhibit 21/(C). The accused also admitted that he had not lodged any police complaint to the fact that his signature had been forcibly taken by the Complainant on the said statement. As per the accused, one Lyold Sequeira was present, though according to him, the said Lyold Sequeira was not present at the room at the Hill View Hotel when the accused

signed the statement admitting his liability on the reverse of the statement sent to him by the Complainant. The accused cited the said Lyold Sequeira as his witness but failed to examine him in support of his defence. In such a situation, an adverse inference has got to be drawn against the accused for the non-examination of the said Lyold Sequeira. The said statement Exhibit 21(C) is the additional document produced by the Complainant to prove his case that the accused was liable to pay the amount due on the cheques issued by the accused to the Complainant.

12. The Apex Court in the case of ***K. Bhaskaran v. Sankaran Vaidhyan Balan & anr.*** (supra), has stated that once the signature on the cheque is admitted to be that of the accused, the presumption envisaged under Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of any debt or liability. In the case at hand, the Complainant had stated, and there was no dispute about it, that the subject cheques in all respects except the dates were filled in by the accused and were handed over to the Complainant. The Complainant had on his own stated that the said cheques had been given to him by the accused a week prior to the dates mentioned on the said cheques and, therefore, it could be safely assumed that the Complainant had the implied authority to put in the date and present the said cheques for payment. As against that, the defence of the accused appears to be wavering

throughout. The accused stated that entire defective goods of Rs.2,19,000/- were returned back to the complainant. If that is so where was the question of the accused writing the said two letters dated 16.7.2002 and 25.7.2002 (Exhibit D.w.1/C) to the complaint? Complainant has denied receiving them. They appear to be fabricated. At one stage, the accused suggested that the cheque for Rs.50,000/- was given by the accused to the Complainant as security, in the starting of the business relationship between the Complainant and the accused. If the business relationship between the Complainant and the accused started in August 1999, as stated by the accused, the said cheque could not have been given to the Complainant in June 2000 as again stated by the accused when he was examined under Section 313 of the Code (Code of Criminal Procedure, 1973). Again the accused stated in his statement under Section 313 of the Code that the cheque was given as deposit and yet again stated that it was given to the Complainant to show to his suppliers to get the materials. Such a wavering stand certainly could not help the accused to overcome the evidence given by the Complainant which was supported not only by the presumption under section 139 of the Act but also by the statement of admission of liability by the accused (Exhibit 21(C). The accused did not produce the statement of his account with Ratnakar Bank Limited and of this, the learned CJM did take note of. However, what is not understandable is, as to why the accused should give the first cheque of Rs. 15,200/- which could be said of an odd amount either by way of deposit/security, etc, as stated by the accused. As regards the second cheque of Rs.50,000/-, the Complainant was asked that along with the said

second cheque bearing no. 3519, one more cheque bearing no. 3518 for Rs.60,000/- was given to the Complainant from the same account and the accused stated that he did not remember about the same. From the Statement of the Account of the accused with Union Bank of India, the accused had tried to disguise the truth by contending that since cheque no. 3518 for Rs.60,000/- was encashed on 01.07.2000, cheque no. 3519 for Rs.50,000/-, was issued in June, 2000. There is no explanation from the accused if the complainant could encash the cheque for Rs.60,000/- , as to why the complainant could not encash the cheque of Rs.50,000/-. The learned Chief Judicial Magistrate has concluded that since the cheque no. 3518 for Rs.60,000/- was realised in July 2000, there was a possibility that the cheque no. 3519 for Rs.50,000/- was issued to the Complainant in June 2000. Firstly, it must be noticed that cheque no. 3519 could not have been issued in June 2000 in case cheque no. 3518, having the previous number, was encashed on 01.07.2000. Secondly, the Complainant did not at all give any explanation as to what happened to cheque nos. 4014 and 4015, which belonged to the next cheque book obtained by the accused starting with cheque no. 4001 and this shows that the accused was not issuing the cheques serially numberwise, and therefore, on the basis of the said statement from Union Bank of India, it could not be concluded that the cheque for Rs.50,000/- bearing no. 3519 was issued in June 2000. The learned Chief Judicial Magistrate has also observed that if both the cheques were issued after writing dated 20.1.2002 (Exhibit 21(C) the amount of the cheques would be higher. This approach of the learned Chief Judicial Magistrate is also

erroneous. For the amount of the cheques to be higher, the accused ought to have had that much amount in his bank and the cheques came to be dishonourned because there was no sufficient balance in the account. Although the accused made an attempt to demonstrate that cheque of Rs.50,000/- could have been issued in June 2000 and failed, no such attempt was at all made as regards cheque of Rs.15,200/-.

13. The Apex Court in the case of ***Hiten P. Dalal v. Bratindranath Banerjee ((2001) 6 S.C.C. 16)***, has stated that the burden is on the accused to dispute the presumptions under Section 138 and 139 and that the accused has to show by acceptable evidence that the existence of the fact to be presumed is improbable. Following the ratio of ***Hiten P. Dalal*** (supra), the Supreme Court in the case of ***K. N. Beena v. Muniyappan & anr. ((2001) 8 S.C.C. 458)*** has again observed that the obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact. The rebuttal does not have to be conclusively established but such evidence must be adduced in support of defence that the Court must either believe the defence to exist or consider its existence reasonably probable, the standard of reasonability being that of the prudent man. In the case at hand, the Complainant had stated that he had received no payment after the statement dated 20.01.2002. The Complainant admitted having collected the sum of Rs.16,118/- from M/s. Auto Parts and M/s. Haroon Hardware, Fatorda. It was

the case of the accused that he had paid the money to the Complainant in the form of demand draft, pay order and cheque but the accused did not produce any of the said instruments to support his statement. In case the Complainant had collected any amount from any of the suppliers of the accused whose names appear on the three receipts produced by the accused at any time or subsequent to the said statement admitting his liability, nothing prevented the accused from examining the persons to whom the accused had supplied the goods and from whom the Complainant had collected any of the amounts, if at all. Considering the nature of the evidence produced by the accused, it does not appear that the defence of the accused is at all probable. This was a case where the Complainant had come with the case of two cheques having been dishonoured by the accused which was not only supported by presumptions available to the Complainant including the presumption under section 139 of the Act but also with a further statement of liability admitted by the accused. It is contended on behalf of the accused that the Complainant had not taken any steps to recover the balance amount as reflected on the said Statement of Account signed by the accused. It has been submitted on behalf of the Complainant that the Complainant has not taken proceedings because of certain difficulties. It is to be noted that the accused has also not taken any proceeding to set that statement right, in case it was wrongly obtained. The mere fact that the Complainant has not taken further action to recover the amount from the accused, as admitted by the accused to the Complainant, the case of the Complainant could not be disbelieved more so in the light of the presumptions

otherwise available to the Complainant. The defence taken by the accused appears to be improbable, for reasons stated herein above. The defence evidence led is insufficient to rebut the presumption. This is a case where the Complainant had proved his case beyond reasonable doubt against the accused. Therefore, the accused is hereby held guilty under Section 138 of the Act.

N. A. BRITTO, J.

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DATE: 21st September, 2006.

JUDGMENT CONTINUED

14. Heard the learned Counsel on behalf of both the parties.

15. Mr. S. S. Kakodkar, the learned Counsel on behalf of the complainant has submitted that adequate sentence in terms of Section 138 of the Negotiable Instruments Act, 1881 be imposed upon the accused and the complainant be suitably compensated as stated by the Supreme Court in para 31 of the Judgment in ***K. Bhaskaran v. Sankaran Vaidhyan (1999 Cri.L.J. 4606)***. On behalf of the accused, Mr. A. D. Bhobe has left the matter of sentencing to the discretion of the Court.

16. Considering the facts and circumstances of the case, the accused is hereby sentenced under section 138 of the Act to undergo seven days S.I. and to pay to the complainant compensation of Rs.20,000/- as regards the first cheque and Rs.70,000/- as regards the second cheque and in default of payment of the said compensation to undergo S.I. for six months.

17. The accused to surrender within a period of two weeks before the learned J.M.F.C. to undergo the said sentence.

N. A. BRITTO, J.

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